SUPREME COURT, U. S.

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No. 1066

In the

Supreme Court of the United States

OCTOBER TERM, 1969

CITY OF PHOENIX, ARIZONA, and MILTON H. GRAHAM, FRANK G. BENITES, CHARLES CASE, JOHN J. LONG, MILTON SANDERS, MRS. DOROTHY THIELKAS, DR. MORRISON F. WARREN, Members of and constituting the City Council of the City of Phoenix, Arizona,

Appellants,

vs.

EMILY KOLODZIEJSKI,

Appellee.

On Appeal From The United States District Court
For The District Of Arizona

BRIEF FOR SALT LAKE CITY, UTAH, AS AMICUS CURIAE

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INTEREST OF AMICUS CURIAE

MAY IT PLEASE THE COURT:

This brief is filed on behalf of Salt Lake City, a political subdivision of the State of Utah, and is sponsored by the City Attorney of said city, the authorized law officer thereof under Rule 42(4) of the Rules of the Supreme Court of the United States. The nature of the city's inter-

est is that Salt Lake City faces a great need for the issuance of bonds for the purpose of extending and improving the municipal airport facilities of the city. The Civil Aeronautics Board has given the necessary approvals which will permit additional air carriers to utilize the Salt Lake City airport and to provide additional service to persons seeking to use air transportation to and from the city. In order to provide adequate facilities for such additional air service, improvements and extensions are required to be made to the existing airport. The Federal Aviation Administration has made $1,000,000 in grant funds available to the city for related airport projects. In the agreement under which the grant funds were obtained the city committed itself to begin construction by June 30, 1970 and to complete construction of certain facilities by July 9, 1971, and others by 1972. Because of delays in the bonding program for the airport, the city may not have sufficient funds available to complete construction in accordance with the agreement with the Federal Aviation Administration. This failure would put in jeopardy any additional grant funds that might be forthcoming and might result in a demand on the city for repayment of funds already expended on projects, because the conditions of the agreement were not subsequently met by the airport.

Throughout the early part of 1969 representatives of the city and representatives of the air carriers serving Salt Lake City negotiated agreements and leases of airport facilities setting charges for the use of the facilities by the airlines. Underlying the negotiations and the agreements reached between the airlines and the city was the fact that the city would call an election for the purpose of submitting to the qualified taxpaying voters of the city the question of issuing $25,000,000 General Obligation

Airport Bonds of the city for the purpose of defraying the cost of improving and extending the municipal airport of said city by adding to and remodeling the existing airline terminal building and facilities, constructing additional auxiliary buildings and facilities to be used in connection with the operation and maintenance of the airport, improving and rehabilitating airport runways, making site relocation of airport utility facilities made necessary by reason of such improvements and extensions, together with the acquisition of all land necessary therefor, and the acquisition of all appurtenant facilities necessary or convenient in connection with such improvements and extensions, all for the use of the traveling public and others using the municipal airport facilities.

The Board of Commissioners of Salt Lake City, in accordance with the program agreed to with the airlines, had scheduled an airport bond election to be held during the month of August, 1969, but such schedule was abandoned and the bond election indefinitely postponed when the implications of *Kramer* v. *Union Free School District,* 395 U.S. 621; 89 S.Ct. 1886, 23 L.Ed.2d 583 (1969), and *Cipriano* v. *City of Houma,* 395 U.S. 701, 89 S.Ct. 1897, 23 L.Ed.2d 647 (1969), decided by this court on June 16, 1969, became apparent as to general obligation bonds.

Section 3 of Article XIV of the Constitution of the State of Utah requires bond elections, of the type contemplated by Salt Lake City, to be submitted to a vote of such qualified electors as shall have paid a property tax therein in the year preceding the election. Inasmuch as Section 3 of Article XIV of the Utah Constitution has been interpreted by the Utah Supreme Court to require a taxpayer election on the issuance of some types of revenue bonds, which election qualification as to revenue

bonds was held to be in violation of the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States in the *Cipriano* case, the legal authority of the city to call and hold a bond election for airport purposes as originally scheduled was immediately placed in jeopardy. Further, because of the widespread publicity given to questions arising as a result of the *Cipriano* case concerning the constitutionality of the provisions of Utah law providing for the holding of elections on the issuance of bonds, none of which provisions distinguish between requirements for elections on general obligation bonds and on revenue bonds, no market exists for the sale of the bonds of the city until such questions have been resolved. One paramount constitutional question remains after the decisions in the *Kramer* and *Cipriano* cases: Do state constitutional limitations on the right to vote at "general obligation" bond elections also constitute the denial of equal protection of law to nontaxpayers who are nevertheless qualified electors, in violation of the Fourteenth Amendment to the Constitution of the United States?

Salt Lake City faces the exact problem raised by the City of Phoenix in the Jurisdictional Statement filed in this appeal, in that no way exists under which a bond election free from doubt under either the requirements of the United States or Utah Constitutions may now be conducted by Salt Lake City.

Salt Lake City is further interested in this appeal in that it has outstanding millions of dollars of general obligation bonds voted at elections where only taxpaying voters participated. In order that the credit standing of Salt Lake City and of all other issuers of such municipal bonds may be protected, the city urges that any decision on the merits in this case which results in voiding

the general obligation bond propositions voted on by the City of Phoenix be made prospective and specifically not apply to outstanding bonds in the hands of the purchasers thereof.

STATEMENT

Salt Lake City, Utah, as *amicus curiae,* adopts the statement of the case appearing in the Jurisdictional Statement of the City of Phoenix, Arizona, the Appellant.

SUMMARY OF ARGUMENT

The continuing necessity for Salt Lake City, and all other municipal corporations and political subdivisions authorized under state law to issue general obligation bonds, to complete bonding programs and to sell their bonds free from constitutional doubt as to their validity, provides a compelling reason why this court should note probable jurisdiction in this cause and order arguments to be heard at the earliest opportunity. This is especially so because of the conflicting decisions rendered by various state and federal courts on the application of the *Cipriano* case in the few short months since that case was decided. The diversity of results reached in the reported decisions to date has contributed greatly to the paralysis of the municipal bond market in Utah and in all other similarly situated states. *Amicus curiae* does not urge that on the merits the court decide one way or another, but does wish to discuss in this brief the application of the pending case and of the opinions of this court in the *Kramer* and *Cipriano* cases to Utah law and to the financial and funding crisis with which Salt Lake City and numerous other municipal corporations and political subdivisions in Utah and in other states are now faced.

ARGUMENT

Plans of the Board of Commissioners of Salt Lake City, Utah, to call a bond election to be held in the city during the month of August 1969 have been indefinitely postponed until the resolution of the question presented in this case: Did the holdings of this court in *Kramer* v. *Union Free School District,* 395 U.S. 621, 89 S.Ct. 1886, 23 L.Ed.2d 583 (1969) and *Cipriano* v. *City of Houma,* 395 U.S. 701, 89 S.Ct. 1897, 23 L.Ed.2d 647 (1969) mean that a state may not limit the right to vote at an election upon the issuance of general obligation bonds to those qualified electors who have paid a property tax in the political subdivision calling the election?

The airport expansion program of the city on which depend additional air carrier service for the city and the faith of the city in performing and completing prior commitments with the Federal Aviation Administration, has been completely halted as a result of the *Cipriano* decision. The problem realistically cannot be resolved solely by action in the state courts, or by the state legislatures, although as will be demonstrated efforts along those lines have been and are being made in Utah, but in the last analysis the problem must be initially resolved by this court in its determining the application of *Cipriano* to general obligation bonds.

Section 3 of Article XIV of the Utah Constitution requires that before debt may be incurred an election must be held at which only qualified taxpaying electors may vote.[1] While this requirement has obvious applica-

[1] Two sections of the Utah Constitution deal with property tax qualifications at elections. The two sections are Section 7 of Article IV and Section 3 of Article XIV, which read as follows:

tion to general obligation bonds issued by a political subdivision, the Utah Supreme Court in *Fjeldsted* v. *Ogden City,* 28 P.2d 144 (Utah 1933), held that where bonds normally considered to be "revenue" bonds, and hence free from constitutional debt limitations, are nevertheless payable from the revenues of existing facilities in addition to the revenues arising from the facilities to be constructed with the bond proceeds, a debt within the meaning of Section 3 of Article XIV of the Utah Constitution is contracted and a taxpayer election is required in order to authorize the issuance of the revenue bonds. The doctrine so adopted by the Utah Supreme Court is usually referred to as the "restrictive special fund doctrine." In *Thompson* v. *City of Centerville,* 417 P.2d 670 (Utah 1966), the Utah Supreme Court held that contract purchasers of real property and spouses of taxpayers which spouses did not own property on the tax rolls, could not be permitted to vote at a bond election.

The Utah Municipal Bond Act, Section 11-14-1 *et seq.* of the Utah Code Annotated 1953, as amended, constitutes

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[1] (Continued)

Sec. 7 [Property qualification, when forbidden.]

Except in elections levying a special tax or creating indebtedness, no property qualification shall be required for any person to vote or hold office.

Sec. 3. [Debts of counties, cities, towns, and school districts not to exceed revenue—Exception.]

No *debt* in excess of the taxes for the current year shall be created by any county or subdivision thereof, or by any school district therein, or by any city, town or village, or any subdivision thereof in this State; unless the proposition to create such debt, shall have been submitted to a vote of such qualified electors as shall have paid a property tax therein, in the year preceding such election, and a majority of those voting thereon shall have voted in favor of incurring such debt.

the legislative authority under which most Utah general obligation and revenue bonds are voted and issued. The Utah Municipal Bond Act, in Sections 11-14-2 and 11-14-5 limits the right to vote at bond elections to qualified taxpaying electors of the issuing political subdivision.[2] In view of the problems concerning municipal bond elections arising from the *Cipriano* decision and the litigation

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[2] Sections 11-14-2 and 11-14-5, Utah Code Annotated 1953, as amended, both part of the Utah Municipal Bond Act, read as follows:

> 11-14-2. Election on bond issues required—Contents of resolution and election notice.—The governing body of any municipality desiring to issue bonds pursuant to the authority granted in section 11-14-1 shall by resolution provide for the holding of an election therein on the question of the issuance of such bonds, and such bonds may be issued only if at such election the issuance thereof shall have been approved by a majority of such qualified electors of the municipality as shall have paid a property tax therein in the year preceding such election, who vote on the proposition. This section does not require an election for the issuance of refunding bonds or other bonds not required by the Constitution to be voted at an election. The resolution calling the election and the election notice shall state the purpose for which the bonds are to be issued, the maximum amount of bonds to be issued, the maximum number of years from their respective dates for which such bonds may run, and the maximum rate of interest which they may bear. The purpose may be stated in general terms and need not specify the particular projects for which the bonds are to be issued or the specific amount of bond proceeds to be expended for each such project. In addition, if the municipality is an improvement district and if the bonds are to be payable in part from tax proceeds and in part from the operating revenues of the district or from any combination thereof, the resolution and notice shall so indicate, but need not specify how the bonds are to be divided as to source of payment.

presently pending in Utah[3] and elsewhere on the subject,

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[2] (Continued)

11-14-5. Qualified electors at bond elections—Determining voters' qualifications.—The words "qualified electors of the municipality as shall have paid a property tax therein in the year preceding such election" as used herein shall have the same meaning as do the same words appearing in section 3 of Article XIV of the Utah Constitution. Election officials conducting bond elections and county officials whose duty it may be to supply records to such election officials for use in determining voters' qualifications shall interpret the aforesaid words in the light of the following instructions:

(a) A qualified elector shall be deemed to have paid the required property tax in the municipality or other entity so proposing to issue the bonds if he owns any property therein, title to which is held in his name, and he has paid any property tax thereon during the twelve months preceding the election.

(b) The spouse of any person mentioned in subparagraph (a) shall not be deemed to have paid a property tax unless such spouse can qualify independently under the terms of subparagraph (a).

A person whose name appears on the official assessment and tax rolls of the county or counties in which the municipality or entity is located as having paid a tax on property in the municipality or entity during the twelve-month period immediately preceding the bond election shall prima facie be considered to have paid the property tax required to qualify him to vote in the election.

[3] In *Cypert* v. *Washington County School District,* Civil No. 4146, Fifth Judicial District in and for Washington County Utah, plaintiff seeks to enjoin the sale of certain general obligation school bonds voted at an election held on May 27, 1969, where the contest period provided for by Utah law had not expired on June 16, 1969. The *Cypert* case has been tried and submitted to the trial judge but no decision has as yet been rendered. In *Anderson* v. *Ogden City,* Civil No. 50717, District Court of

the Utah Senate on January 27, 1970, and the Utah House of Representatives on January 29, 1970, adopted Senate Bill No. 3 of the 1970 Regular Session of the Utah Legislature, amending Section 11-14-2, Utah Code Annotated, 1953, as amended, to provide that if the taxpaying elector requirement of Section 3, Article XIV, of the Utah Constitution shall ever be removed by vote of the people or declared to be in violation of the requirements of the Constitution of the United States that all qualified electors may henceforth vote at all bond elections.[4] It is obvious that

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[3] (Continued)
Weber County, Utah, Ogden City has adopted proceedings calling a revenue bond election to be held on February 17, 1970, limiting the right to vote to taxpayers. The plaintiff in the *Anderson* case seeks to enjoin the calling and holding of the election. The *Anderson* case has not been heard by the trial court.

[4] The text of Section 1 of Senate Bill No. 3, 1970 Regular Session Utah Legislature, as passed by the Utah Senate and the Utah House of Representatives, but as yet not signed by Governor Rampton is as follows:

> Section 1. Section 11-14-2, Utah Code Annotated 1953, as enacted by Chapter 4, Laws of Utah 1965, is amended to read:
>
> 11-14-2. The governing body of any municipality desiring to issue bonds pursuant to the authority granted in section 11-14-1 shall by resolution provide for the holding of an election therein on the question of the issuance of such bonds, and such bonds may be issued only if at such election the issuance thereof shall have been approved by a majority of such qualified electors of the municipality as shall have paid a property tax therein in the year preceding such election, who vote on the proposition; provided, however, if the provisions of the Utah Constitution which limit the right to vote at such an election to such qualified electors of the municipality as shall have paid a property tax therein in the year preceding such election are removed by constitutional amend-

implementation of Senate Bill No. 3 awaits the decision of this court in this cause. Efforts to solve the problems raised by the *Cipriano* case by holding two elections, one at which only taxpayers vote and one at which all qualified electors vote, are beset by concern that no authority exists under state constitutions for a legislature to authorize non-taxpayers to vote at a bond election, and secondly, whether because the taxpayers retain a veto over the issuance of the bonds even though a majority of the qualified electors voted in favor of the issuance of the bonds, the requirements of this court in "one-man, one-vote" cases such as *Reynolds* v. *Sims*, 377 U.S. 533, 12 L.Ed.2d 506, 84 S.Ct. 1362 (1964), will be violated.

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* (Continued)

ment or are held to be in violation of the Constitution of the United States by the Supreme Court of this state or of the Supreme Court of the United States and hence inapplicable to such election or if the municipality is not a county, school district, city or town which is subject to the provisions of Article XIV, Section 3, Utah Constitution and hence the limitations of such section are inapplicable to a bond election held by such a municipality, then it is the express intention of the legislature that propositions for the issuance of bonds under the Utah Municipal Bond Act shall be submitted at an election at which all qualified electors of the municipality may vote, and such bonds may be issued if the proposition is approved by a majority of those voting on the proposition who are entitled to vote at such election as provided in this section. A bond election at which all qualified electors shall be permitted to vote as provided above shall be called, held and conducted as otherwise provided in the Utah Municipal Bond Act except that the provisions and requirements of sections 11-14-5, 11-14-6 and 11-14-11 limiting the right to vote to the qualified electors of the municipality as shall have paid a property tax therein in the year

While used in some areas, because of the constitutional problems mentioned above, this approach has generally been considered to be, at most, a temporary and cumbersome solution.

Section 11-14-12, Utah Code Annotated, 1953, as amended, contains a bond election contest provision similar to that discussed and relied upon in the *Cipriano* opinion and as applied by the Louisiana Supreme Court in *Andrieux* v. *East Baton Rouge Parish School Board,* 227 So.2d 370 (Louisiana 1969).[5]

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[4] (Continued)

preceding the election or requiring proof of payment of such property tax or referring to a vote of property taxpayers shall not apply. This section does not require an election for the issuance of refunding bonds or other bonds not required by the Constitution to be voted at an election. The resolution calling the election and the election notice shall state the purpose for which the bonds are to be issued, the maximum amount of bonds to be issued, the maximum number of years from their respective dates for which such bonds may run, and the maximum rate of interest which they may bear. The purpose may be stated in general terms and need not specify the particular projects for which the bonds are to be issued or the specific amount of bond proceeds to be expended for each such project. In addition, if the municipality is an improvement district and if the bonds are to be payable in part from tax proceeds and in part from the operating revenues of the district or from any combination thereof, the resolution and notice shall so indicate, but need not specify how the bonds are to be divided as to source of payment.

[5] The bond election contest provisions, set forth in the Utah Municipal Bond Act, Section 11-14-12, Utah Code Annotated 1953, as amended, read as follows:

11-14-12. Contest of election and legality of bonds —Procedure.—The general election laws with respect

Section 11-14-19 of the Utah Code Annotated 1953, as amended, provides that all bonds not paid solely from revenues constitute full general obligations to which the full faith and credit of the municipal corporation is pledged[6]. Such bonds enjoy an obligation on the part of

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[5] (Continued)

to the contest of elections shall be applicable to bond elections. Any such contest shall be regarded as one contesting the outcome of the vote on the proposition, rather than election to office, the municipality or other entity calling the election rather than a person declared to have been elected to office, shall be regarded as the defendant, and one of the grounds of contest may be the lack of the required qualifications of voters in sufficient numbers to change the result of the bond election.

When the validity of any bond election is contested, the plaintiff or plaintiffs must, within forty days after the returns of the election are canvassed and the results thereof declared, file with the clerk of the district court of the county in which any part of the municipality or entity conducting the bond election or some part thereof is located, a verified written complaint setting forth specifically:

(1) The name of the party contesting the bond election, and that he is an elector of the municipality or entity conducting the bond election.

(2) The proposition or propositions voted on at the bond election which are contested.

(3) The particular grounds of such contest. No such contest shall be maintained and no bond election shall be set aside or held invalid unless such a complaint is filed within the period prescribed in this section.

[6] Section 11-14-19, Utah Code Annotated 1953, as amended, reads as follows:

11-14-19. General obligation bonds—Levy and collection of taxes.—Any bonds issued hereunder in such manner that they are not payable solely from revenues other than those derived from ad valorem taxes

the issuing entity to levy and collect annually ad valorem taxes without limitation as to rate or amount fully sufficient for the purpose. Under the provisions of Sections 59-10-3 and 59-10-42 Utah Code Annotated 1953, as

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* (Continued)

shall constitute full general obligations of the municipality, for the prompt and punctual payment of principal of and interest on which the full faith and credit of the municipality are pledged, and the municipality is hereby expressly required, regardless of any limitations which may otherwise exist on the amount of taxes which the municipality may levy, to provide for the levy and collection annually of ad valorem taxes without limitation as to rate or amount on all taxable property in the municipality fully sufficient for such purpose. If by law ad valorem taxes for the municipality are levied by a board other than its governing body, the taxes for which provision is herein made shall be levied by such other board and the municipality shall be under the duty in due season in each year to provide such other board with all information necessary to the levy of taxes in the required amount. Such taxes shall be levied and collected by the same officers, at the same time and in the same manner as are other taxes levied for the municipality.

If any municipality shall neglect or fail for any reason to levy or collect or cause to be levied or collected sufficient taxes for the prompt and punctual payment of such principal and interest, any person in interest may enforce levy and collection thereof in any court having jurisdiction of the subject matter, and any suit, action or proceeding brought by such person in interest shall be a preferred cause and shall be heard and disposed of without delay. All provisions of the Constitution and laws relating to the collection of county and municipal taxes and tax sales shall also apply to and regulate the collection of the taxes levied pursuant to this section, through the officer whose duty it is to collect the taxes and money due the municipality.

amended, taxes are made a lien on the property of a taxpayer, which lien may be foreclosed upon for delinquent taxes.[7]

This court in the *Cipriano* case stated that discrimination in voting qualifications at revenue bond elections based upon the taxpaying status of the voter violates the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States. Unfortunately, it is the same constitutional provision under Utah law which requires a taxpayer election for general

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[7] Sections 59-10-3 and 59-10-42, Utah Code Annotated 1953, as amended, read as follows:

59-10-3. Nature and extent of lien.—Every tax upon real property is a lien against the property assessed; and every tax due upon improvements upon real estate assessed to others than the owner of the real estate is a lien upon the land and improvements; which several liens attach as of the 1st day in January of each year.

59-10-42. Time—Venue—Parties—Pleading.—In all cases where any county claims a lien on real estate for delinquent general taxes which have not been paid for a period of four years, such county may foreclose such lien by an action in the district court of the county in which the real estate is located. In any such action all persons owning or having or claming an interest in or lien upon the real estate or any part thereof may be joined as defendants, and the complaint shall contain a description of the land, together with the amount claimed to be due thereon, including interest, penalties and costs, and if the name of the owner of any such real estate cannot be ascertained from the records of the county, then the complaint shall state that the owner is unknown to the plaintiff. It shall be sufficient to allege in such complaint that a general tax has been duly levied upon the real estate described therein, without stating any of the proceedings or steps leading up to the levy of such tax.

obligation bonds as requires a taxpayer election for revenue bonds and hence, to the extent that it applies to revenue bonds, the taxpaying restriction of Section 3 of Article XIV of the Utah Constitution is clearly void under the *Cipriano* decision. However, Salt Lake City wishes to vote and sell general obligation bonds for airport expansion purposes, but is prevented from doing so for the reason that neither the Utah Supreme Court, nor this court, has passed on the questions of (1) whether *Cipriano* applies to general obligation bonds, and (2) whether there is authority for Salt Lake City to call an election for the issuance of general obligation bonds if the Constitution of Utah is only in part unconstitutional. Thus, Salt Lake City has no way it can hold a bond election which will not be subject to constitutional attack, under either the federal or state constitution, depending on whether or not non-taxpayers were permitted to vote at the election. This is the exact problem facing the City of Phoenix and arises from the same constitutional questions presented in this appeal.

In the *Cipriano* opinion, attention was called to the circumstances under which *arguendo* "a State might, in some circumstances, constitutionally limit the franchise to qualified voters who are also 'specially interested' in the election. . ." 395 U.S. at 704. In this appeal, the question is posed as to the quantum of "interest" of the taxpayers and non-taxpayers in the context of a general obligation bond issue when, under the state law, the full faith and credit of a municipal corporation is pledged to the repayment of the bonds, together with the obligation imposed by law to levy and collect sufficient ad valorem taxes, which taxes constitute a forecloseable lien on the property of the taxpayer. This is unlike a revenue bond payable solely from revenues as considered

in the *Cipriano* case, even though under Utah law no difference is recognized for purposes of the state constitutional requirement of an election on the incurring of "debt". The characterization of the differences between "general obligation" and "revenue" bonds is deceptively easy, but an analysis in terms of actual municipal finance practices becomes extremely difficult. The proposed general obligation airport bond election of Salt Lake City provides a good example of this complexity in terms of the constitutional questions now before the court in this appeal.

The city is now, and will in the future, lease airport facilities to the air carriers serving the city at rentals which will be sufficient to pay the cost of operating the airport facilities so leased and used by the carriers in providing air service to the city, and the payment of debt service on the general obligation bonds of the city issued for airport purposes. It has been the practice of the city that debt service on the outstanding general obligation airport bonds of the city is, in fact, paid for from airport revenues, although the outstanding bonds were voted and issued as general obligation bonds and the city is obligated under the terms of the authorizing ordinance to levy and collect the necessary taxes if the revenues are ever insufficient for the purpose.[8] The airport bonds which

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[8] Section 11 of Ordinance No. 8-1959 of the City of Salt Lake City, Utah, as adopted on February 11, 1959, reads as follows:

> Section 11. That from and after the delivery of any of the bonds authorized to be delivered under this ordinance and so long as any of said bonds are outstanding or unpaid either as to principal or interest, the entire gross income and revenues of Administration Building No. 2 shall be used (1) for the

the city now hopes to be able to issue will also be denominated as general obligation bonds but it is the intention of the city in fact to pay such bonds from airport revenues to the extent revenues are available. The levy of the taxes will be abated in each year in which such taxes need not be collected because of the availability of airport revenues to pay debt service. It is apparent why municipalities seek to issue bonds in such manner. Bonds payable solely from revenues must be sold at higher interest rates because of the greater risk to the investor, therefore general obligation bonds carrying a full faith and credit tax pledge are sold at an interest rate which is lower than revenue bonds would bear. This gives the investor greater protection, but as the bonds are retired from revenues from the use of the facility, the tapayers are relieved in most years of the obligation to pay taxes. This practice is quite common throughout the country in many general obligation bond issues for various facilities which generate revenues, such as airports.

What, then, are the relative "interests" which must be constitutionally protected in a voting rights case concerning a bond election? Is the possible contingent liability

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[8] (Continued)

maintenance and operation of the building, (2) for the payment of the principal of and interest on the bonds issued pursuant to this ordinance, and (3) in such other lawful manner as may be determined by the Board of Commissioners; provided, however, that nothing herein contained shall be construed as conferring contractual rights on the bondholders insofar as the application of such revenues is concerned, and provided, further, that the income and revenues derived from the operation of Administration Building No. 2 shall be collected, held and disbursed in accordance with procedures established by law governing public funds.

of the taxpayer to the collection of the tax or the foreclosure upon his property for failure to pay the tax levied to retire a bond issue, such an interest as requires that constitutionally the state may provide that only he and not the non-taxpayer elector may vote on the issuance of the bonds and hence on the question of whether or not the municipality shall acquire the project involved? Does the "interest" spoken of at great lengths in the *Kramer* and *Cipriano* opinions relate to the burdens imposed by the results of a bond election, *i.e.*, the levy and collection of the taxes, or does it relate to the interest of the voters generally in the community in the desirability or necessity for the acquisition of the facilities of the bonding program being voted upon at the election? Who is the most "interested" in the proposed Salt Lake City airport expansion? It can be suggested that most directly interested are the airline companies, non-resident travelers, resident corporations whose business will benefit from expansion of the airport, but none of whom may vote at the bond election nor whose interests would be protected by a decision of this court holding that all qualified electors may vote. Can and should the line as to the validity of election qualifications at bond elections be drawn solely on the supposed degree of "interest" of those included or excluded as a result of a taxpayer qualification, or does the logical extension of the *Kramer* and *Cipriano* cases mean that under no circumstances may a taxpayer qualification be constitutionally imposed at an election, whether held for revenue bonds, general obligation bonds, or even for special millage purposes. Many who are interested in the outcome of a bond election in only a subjective way cannot vote under Utah law, and many who are interested only in a slight degree are permitted to vote, while many would be permitted

to vote who have only slight interest if the decision of this court would mean that all qualified electors may vote. In addition, persons not now interested either in use of the airport or in the levy of taxes, may in the future become taxpayers and be subject to the levy of taxes to retire the bonds or may become users of the facilities. Are such persons who will subsequently become interested in the project, or be subject to the levy of taxes, to be disenfranchised, or in the last analysis must all qualified electors be permitted to vote at such a bond election?

All such questions are presented to the court in this appeal, and apply not only to the City of Phoenix, but to all municipal corporations in all states whose laws provide taxpaying qualifications at general obligation bond and other special purpose elections. It is imperative, therefore, that this court accept jurisdiction of this case and set the cause down for early argument.

In the few short months since June 16, 1969, many lawsuits have been started all over the country testing the application of the *Cipriano* case to various situations. As pointed out, *supra*, two of such cases are now pending in the Utah courts. In recent weeks several of these cases have been decided, demonstrating further the confusion resulting from the hiatus surrounding the lack of knowledge on the part of municipal corporations and the purchasers of municipal bonds of whether the *Cipriano* decision eliminates taxpayer qualifications at general obligation bond elections. For example, the decision of the trial court in this case is in direct conflict with the holding of the Supreme Court of the State of Idaho rendered on January 16, 1970, in *Muench* v. *Paine,* No. 10552, the text of which opinion is set forth in full as an appendix to this brief. It is submitted that the conflict among the

courts of both the federal and state judiciary is in itself a compelling argument for a prompt hearing and decision in this case.[9]

In the *Cipriano* opinion this court recognized the necessity of not giving its decision as to revenue bonds full retroactive effect. Such necessity applies equally as well to general obligation bonds as involved in this appeal. The credit of all political subdivisions would suffer if general obligation bonds previously voted under then thought to be valid state laws and sold to the investing public prior to the *Cipriano* case could now be attacked on the grounds of the invalidity of the election under the requirements of the Federal Constitution. Inasmuch as few if any bonds have been voted and fewer bonds issued in states having taxpayer qualifications as to general obligation bonds since the *Cipriano* decision, unless the court feels the necessity of uniform application of the prospective nature of its opinions as to revenue and general obligation bonds, it would seem to be desirable for any decision in this case as to general obligation bonds to be prospective from the date of the

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[9] On January 23, 1970 a three-judge court in the United States District Court for the Western District of Louisiana, Shreveport Division handed down a decision in *Hobbs* v. *Police Jury of Morehouse Parish,* Civil Action No. 14836, holding that under the prescriptive language appearing in the *Cipriano* case, the passage of the state peremptive period *after* June 16, 1969, without challenge by a non-taxpayer who is an otherwise qualified elector, bars the institution of suit attacking the validity of a general obligation bond election wherein is alleged the unconstitutionality of the Louisiana Constitution and Statutes insofar as they require a voter at an election on the issuance of general obligation bonds to be a taxpayer.

new opinion. The main reason for this is that many general obligation bond issues which were voted before June 16, 1969, where either the state contest period, such as that provided in Section 11-14-12, Utah Code Annotated, 1953, as amended, had not expired on June 16, 1969, or state law did not provide a contest period such as the court referred to in the *Cipriano* opinion, have simply not been marketable because of the constitutional questions raised in the *Cipriano* case as discussed in this brief. It has been thought that only if the state contest period had expired on June 16, 1969, would general obligation bonds be free from doubt under the ruling in the *Cipriano* case. Thus the decision of this court, making its opinion as to general obligation bonds apply only from the date of that new opinion, would then permit the successful sale of many previously voted authorizations now delayed and would permit the sale of such bonds without the additional expense of holding new elections and without incurring delays pending the time needed for state bond election laws to be brought into conformance with the requirements of the United States Constitution.

CONCLUSION

Salt Lake City, here *amicus curiae,* citing the postponement of the bonding program for its urgently needed airport expansion, the effect of such postponement on its commitments to the Federal Aviation Administration to complete the airport construction, the conflicts now existing in the reported decisions of state and federal courts as to the application of the *Cipriano* decision to general obligation bond issues, requests that this court note probable jurisdiction in this appeal, set the cause for early argument and render a decision as soon thereafter as possible.

Respectfully submitted,

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APPENDIX

IN THE SUPREME COURT OF THE STATE OF IDAHO

Ernst G. Muench and Lloyd Taylor, Plaintiffs, v. Marlin Pain, Archie Yamamoto, James Nafsinger, Bruce Bartlett, Leonard D. Wagers, Trustees of School District No. 139, Canyon County, Idaho; and Wilma Law, Clerk of the Board of Trustees of School District No. 139, Canyon County, Idaho, Defendants.	No. 10552 January 16, 1970

McFADDEN, *C.J.*

Both Ernst G. Muench and Lloyd Taylor, the plaintiffs in this original proceeding, are residents of School District No. 139 in Canyon County, Idaho. Plaintiff Taylor has children attending school in this district, and plaintiff Muench is a real property taxpayer in the district. They instituted this action seeking a writ of prohibition to prohibit and restrain the defendant trustees of School District No. 139 of Canyon County from selling general obligation school bonds in the amount of $805,000, after issuance of such bonds was approved in a school bond election held on May 27, 1969. An alternative writ of prohibition was issued by this court and hearing was had by this court following the filing of the defendants' return to the plaintiffs' petition.

The facts before this court are undisputed. In April 1969 the defendants as the Board of Trustees of School District No. 139 adopted a resolution calling for a bond

election at which the voters would decide whether general obligation bonds in the amount of $805,000 should be issued for the purpose of acquiring school sites and improving school facilities by building, furnishing and equipping two elementary school buildings in the district. Pursuant to I.C. § 33-404[1] the franchise in this election was limited to qualified electors of the State and residents of the district who are taxpayers (or the spouse of a taxpayer) on real property located in the district. The

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[1] I.C. § 33-404. "Qualifications of school electors.—Any person voting, or offering to vote, in any school election must be, at the time of the election:

1. An elector within the meaning of article 6, section 2 of the Constitution of the State of Idaho;
2. A resident of the district and, in the case of election of trustees, a resident of the same trustee zone as the candidate or candidates for school district trustees for whom he offers to vote;

In addition to the foregoing qualifications, a school elector must be:

a. A parent or guardian of any child or children under the age of twenty-one (21) years, when such child or children reside in the district; or
b. A taxpayer on real or personal property situate in the district, or spouse of such taxpayer;

and shall have executed, in writing and immediately before voting, a form of elector's oath attesting that he or she possesses the qualifications of a school elector prescribed by this section. The forms of electors' oaths shall be included in the records and returns of the board of election.

In any school election held on a proposal to incur, increase or assume any indebtedness, or to approve a levy for any school plant facilities reserve fund, any person voting, or offering to vote in such election shall have and possess the qualifications set forth in (1) and (2), above, and in addition thereto be a taxpayer on real property situate in the district, or the spouse of such taxpayer.

For the purpose of this section, a taxpayer on real property shall be one who pays taxes, or who is obligated as owner or contract purchaser to pay taxes, on real property."

plaintiffs maintain that a writ of prohibition should issue to prohibit the sale of these bonds, which were approved at the election by a vote of 723 to 297, on the ground that the election was invalid in that I.C. § 33-404 in limiting the franchise to voters in the district who were real property taxpayers is unconstitutional as a violation of the equal protection clause of the Fourteenth Amendment of the United States Constitution and in violation of Sections 2, 3 and 20 of Article 1 of the Constitution of this state.[2] In support of their position, plaintiffs cite *Kramer v. Union Free School Dist.*, ... U.S. ....., 23 L.Ed.2d 583, 89 S. Ct. 1886 (1969) and *Cipriano* v. *City of Houma*, ... U.S. ....., 23 L.Ed.2d 647, 89 S. Ct. 1897 (1969).

At the outset a question is presented whether a petition for a writ of prohibition is the proper procedure for bringing this case before the court. I.C. § 7-401 provides that a writ of prohibition can issue only to arrest "the proceedings of any tribunal, corporation, board or person, when such proceedings are without or in excess of the jurisdiction of such tribunal, corporation, board

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[2] Art. 1 § 2. "Political power inherent in the people.—All political power is inherent in the people. Government is instituted for their equal protection and benefit, and they have the right to alter, reform or abolish the same whenever they may deem it necessary; and no special privileges or immunities shall ever be granted that may not be altered, revoked, or repealed by the legislature."

Art. 1, § 3. "State inseparable part of Union.—The state of Idaho is an inseparable part of the American Union, and the Constitution of the United States is the supreme law of the land."

Art. 1, § 20. "No property qualification required of electors—Exceptions.—No property qualifications shall ever be required for any person to vote or hold office except in school elections, or elections creating indebtedness, or in irrigation district elections as to which last-named elections the legislature may restrict the voters to land owners."

or person." Moreover, such writ is not available unless there is no plain, speedy and adequate remedy in the ordinary course of law. *Clearwater Timber Protective Ass'n* v. *District Court,* 84 Idaho 129, 369 P.2d 571 (1962). In a proper case this court has the authority to issue a writ of prohibition. Art. 5, § 9, Idaho Const.; I.C. § 1-203.

In *Baker* v. *Gooding County,* 25 Idaho 506, 138 Pac. 342 (1914), this court held that a writ of prohibition would lie to restrain county commissioners from selling bonds when it appeared that the resolution for submitting the bond issue to the electorate had not been properly passed. Under such circumstances, this court held, the commissioners were acting in excess of their jurisdiction. The issue before the court is of such great public interest affecting the validity of existing bond issues and the rights of the several school districts of this state (as well as other taxing authorities of this state) that a decision on the issues is deemed essential in the interests of the welfare of this state. See *Rich* v. *Williams,* 81 Idaho 311, 341 P.2d 432 (1959); *White* v. *Young,* 88 Idaho 188, 397 P.2d 756 (1964). It is the conclusion of the court that the petition for a writ of prohibition is the proper procedure for challenging the validity of the particular bond election in question.

The defendants, by their return to the petition, allege that the election involved in this action was held May 27, 1969 and that the trustees of the district canvassed the results of the election the same day. They further allege that the petition herein was filed on September 14, 1969, and then contend that by reason of the provisions of S.L. 1969, Ch. 208, now I.C. § 34-2001A, that the instant action was not timely brought. Some doubt is entertained by the court as to the applicability of that act to the instant case. In particular there is a question as to whether this original proceeding challenging the constitutionality of I.C. § 34-404 is within the scope of I.C. § 34-2001A. See *Kramer* v. *Union Free School Dist.,*

supra, and *Cipriano* v. *City of Houma,* supra. However, the defendants expressed to the court in argument that they waive this forty day time limitation as a defense to this action.

This court is aware of the crises facing so many of the school districts in this state as expressed by counsel and by the amicus curiae in their respective briefs. The school districts are under constant pressure for additional facilities by way of new building, new classrooms and the necessary equipment for such new construction, the need for which is created by the continual increase in the number of children reaching school age. The school districts in the state can meet the demands for such new construction only by raising the funds from the sale of bonds which have been authorized at an election following regular proceedings to present the issue. We also recognize the fact that at present the bond issues of this state that have been approved are not saleable in the open market. Because of these urgent problems facing the school districts of the state, and because of the great public interest in the result of this litigation[3] it is the conclusion of this court that the waiver by the defendants of the defense alleged in their answer that the cause is barred by the time provisions of I.C. § 34-2001A, will be accepted and redetermination of such issues reserved for a future case. *Branson* v. *Firemen's Retirement Fund,* 79 Idaho 167, 312 P.2d 1037 (1957); *Rivera* v. *Johnston,* 71 Idaho 70, 225 P.2d 858 (1951); *Frisbie* v. *Sunshine Mining Co.,* 93 Idaho ....., 457 P.2d 408 (1969).

We come then to the central issue of whether the statutes of this state, and in particular I.C. § 33-404 (supra, note 1), restricting the franchise in school bond elections to real property taxpayers and their spouses is unconstitutional. The plaintiffs do not challenge that portion of I.C. § 33-404 which requires that a voter be

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[3] See *Rich* v. *Williams,* 81 Idaho 311, 341 P.2d 432 (1959); *White* v. *Young,* 88 Idaho 138, 397 P.2d 756 (1964).

an elector under the provisions of Idaho Const. Art 6, § 2 and a resident of a school district. They do, however, challenge that portion of the statute requiring that a voter in a "school election" be the parent or guardian of a child under twenty-one years of age or a taxpayer on real or personal property located in the district and that portion which requires a voter in a "school election held on a proposal to incur, * * * any indebtedness" to be a taxpayer, or spouse of a taxpayer, on real property.

I.C. § 33-404 sets out qualifications for voting in two distinct types of elections: i.e. "school elections" and "school elections held on a proposal to incur indebtedness." The parental and real or personal property taxpayer qualifications are applicable only to the former and are not involved here. However, in view of *Kramer* v. *Union Free School Dist.*, supra, such qualifications are unconstitutional when applied to school elections. We are concerned solely with the validity of the real property taxpayer requirement in a "school election held on a proposal to incur * * * any indebtedness."

It has long been settled that the United States Constitution leaves establishment of voter qualifications to the individual states. United States Constitution, Art. 1, § 2; *Lassiter v. Northampton County Election Board*, 360 U.S. 45, 79 S.Ct. 985, 3 L.Ed.2d 1072 (1959). Only when these qualifications result in an invidious discrimination are they in violation of the equal protection clause of the United States Constitution. See *Harper* v. *Virginia State Board of Elections*, 383 U.S. 663, 86 S.Ct. 1079, 16 L.Ed2d 169 (1966).

The discrimination between property owners and non-property owners in elections to create indebtedness was authorized in Idaho since adoption of its constitution in 1890. Idaho Const. Art. 1, § 20; *Wiggin* v. *City of Lewiston*, 8 Idaho 527, 69 Pac. 286 (1902); *Hartman* v. *Meier*, 39 Idaho 261, 227 Pac. 25 (1924). See also *Bissett* v. *Pioneer Irrigation Dist.*, 21 Idaho 98, 120 Pac. 461 (1912); *Carville* v. *McBride*, 202 Pac. 802 (Nev. 1922). The

plaintiffs, however, contend that the existing Idaho Constitutional provision, statutory law, and decisions of this court have been rendered unconstitutional by the United States Supreme Court in *Kramer* v. *Union Free School Dist.*, ... U.S. ....., 23 L.Ed.2d 583, 89 S.Ct. 1886 (1969); and *Cipriano* v. *City of Houma*, ... U.S. ....., 23 L.Ed.2d 647, 89 S.Ct. 1897 (1969).

The defendants contend that *Kramer* v. *Union Free School Dist.*, supra, and *Cipriano* v. *City of Houma*, supra, are inapplicable to the present case. They seek to distinguish these cases on the ground that the former involved a "political" election in that an election of representatives on the school board was involved and that the latter involved revenue bonds rather than general obligation bonds as in the present case. It is our opinion, however, that the rationale developed in *Kramer* v. *Union Free School Dist.*, supra, for determining whether a voting statute violates the Equal Protection Clause is not restricted to "political" elections, but rather is applicable to all types of elections. The court in that case stated that

> "Our exacting examination is necessitated not by the subject of the election; rather, it is required because some resident citizens are permitted to participate and some are not." at 89 S.Ct. 1891.

Also, the fact that the *Kramer* rationale was applied in the *Cipriano* decision indicates that it is not restricted to strictly "political" elections.

Neither *Kramer* v. *Union Free School Dist.*, supra, nor *Cipriano* v. *City of Houma*, supra, controls the present case however. Neither case holds that discrimination between property owners and non-property owners in a voting statute is per se a violation of the Equal Protection Clause. On the contrary, the court in each case assumed that in certain elections the franchise might be limited to a particular group or class of citizens. In *Kramer* v. *Union Free School Dist.*, supra, the court stated that

> "We need express no opinion as to whether the State in some circumstances might limit the exercise of the franchise to those 'primarily interested' or 'primarily affected.' Of course, we therefore do not reach the issue of whether these particular elections are of the type in which the franchise may be so limited." 89 S.Ct. at 1892.

Similarly the court stated in *Cipriano* v. *City of Houma*, supra.

> "Assuming *arguendo* that a State might, in some circumstances, constitutionally limit the franchise to qualified voters who are also 'specially interested' in the election, whether the statute allegedly so limiting the franchise denies equal protection of the laws to those otherwise qualified voters who are excluded depends on [quoting from *Kramer* v. *Union Free School Dist.*] 'whether all those excluded are in fact substantially less interested or affected than those the statute includes.'" 89 S.Ct. at 1899-1900.

The court noted, however, that for a limitation in the franchise to be constitutionally approved, it must be necessary to achieve a compelling state interest and that the statute must be so tailored so that all of those excluded are substantially less interested or affected than all of those included. The distinction between *Kramer* v. *Union Free School Dist.*, supra, and the present case lies in the fact that in *Kramer* the election was, at least in part, for the purpose of selecting representatives to serve on the school board. The court reasoned in that case that issues of general school policy were involved, issues in which every resident of the district, parent and non-parent, property owner and non-property owner alike, had a common interest. The court thus concluded that Kramer was not substantially less interested in or affected by the election than other persons allowed to vote and that the statute therefore invidiously discriminated against him in violation of the Equal Protection Clause.

Cipriano v. *City of Houma,* supra, is also distinguishable from the present case in that *Cipriano* involved the sale of revenue bonds rather than general obligation bonds. Revenue bonds differ from general obligation bonds in that the former are paid out of revenue generated by the utility which they finance; they are not financed by property tax revenue. In holding the statute restricting the franchise to real property taxpayers unconstitutional in *Cipriano* v. *City of Houma,* supra, the court was careful to note that

> "Of course, the operation of the utility systems—gas, water, and electric—affects virtually every resident of the city, nonproperty owners as well as property owners. All users pay utility bills, and the rates may be affected substantially by the amount of revenue bonds outstanding. Certainly property owners are not alone in feeling the impact of bad utility service or high rates, or in reaping the benefits of good service and low rates.
>
> "The revenue bonds are to be paid only from the operations of the utilities; they are not financed in any way by property tax revenue. Property owners, like nonproperty owners, use the utilities and pay the rates; however, the impact of the revenue bond issue on them is unconnected to their status as property taxpayers. Indeed, the benefits and burdens of the bond issue fall indiscriminately on property owner and nonproperty owner alike." 89 S.Ct. at 1900.

The key distinction between *Kramer* v. *Union Free School Dist.,* supra, and *Cipriano* v. *City of Houma,* supra, and the present case, then, is that in *Kramer* and *Cipriano* the court was unable to say that the excluded class of voters was substantially less interested in or affected by the election than was the included class. The United States Supreme Court did not hold in either *Kramer* v. *Union Free School Dist.,* supra, or *Cipriano* v. *City of Houma,* supra, that there was not a compelling state interest in limiting the franchise in special elections to

those persons more interested in and more substantially affected by the outcome of the election than the excluded class of voters, but, at most only held that in those cases the excluded class was as substantially affected by the election as the included class.

This court in *Hartman* v. *Meier*, 39 Idaho 261, 227 Pac. 25 (1924), quoted with approval from the memorandum opinion of the trial court in that case as follows:

> "What, then, is the purpose of the legislature in requiring that electors at bond elections must possess the added qualifications of being 'taxpayers of the municipality'? The mere ownership of property has long since ceased to be considered as a proper element in determining the general right of suffrage; a property owner is no more competent to judge of the suitability of a candidate for office or the advisability of a public improvement than any other person. Obviously the purpose of this act was to restrict the issuance of bonds to such issues as should be consented to by at least two-thirds of those who were to be primarily affected by the burden thereby imposed. Any other purpose would be unreasonable and absurd. Unless the ownership of property be considered only with reference to the burden imposed by the result of the election, it should not be considered at all. The legislature in adding this qualification must have intended to require the submission of the question to those who would be peculiarly affected by the result of the election. An automobile owner who pays his registration fee is not so affected; the issuance of the bonds neither increases nor diminishes the amount of his license fee, and his automobile is not otherwise taxed. Nor is his privilege fee within the commonly accepted meaning of the word 'tax,' nor is he a taxpayer in the commonly accepted meaning, as held in the decisions above mentioned."

Under the statutes of Idaho pertaining to school bonds, in Chapter 11, Title 33, Idaho Code, bonds are to be

issued upon an amortization plan (I.C. § 33-1107) "and the various annual maturities of any issue of bonds shall as nearly as practicable be in such principal amounts as will, together with accruing interest on all outstanding bonds of such issue, be met and paid by an equal annual tax levy during the term for which such bonds shall be issued." I.C. § 33-801 requires the tax levies be set by the school trustees, and I.C. § 33-802 provides that any tax levied for school purposes shall be a lien on the property against which the tax is levied, including the levies required to satisfy all maturing bonds, and bond interest. In the event of a failure of the trustees to certify such levy to the board of county commissioners, the board of county commissioners is required to set a levy sufficient to meet all accruing bond and bond interest charges for the year. I.C. § 33-1115 provides "The faith of each district is solemnly pledged for the payment of interest and redemption of principal on all bonds lawfully and validly issued."

Under I.C. § 63-101, "All property within the jurisdiction of this state, not expressly exempted, is subject to assessment and taxation." After January 1, 1970, all taxes levied upon both personal property and real estate are a lien upon such real estate, (I.C. § 63-102—104). When a bond issue which is payable from the taxes levied on the property of the district is authorized by a school district, it may be for a term of as many as twenty years (I.C. § 33-1107). The total amount of bonds that may be issued by the school district is limited by a percentage of the assessed valuation.

It is apparent that the real property taxpayers have an interest in the outcome of school district bond elections substantially greater than other electors who are not also taxpayers on real property. The owners of the real property in the district are faced with the additional tax burden for the number of years authorized by the bond issue; they are subject to having a lien placed on their real property which continues year by year for the

life of the bond issue. Electors, who neither own nor pay taxes on real property do not have this real and substantial interest. It is recognized that both non-real property taxpayers and real property taxpayers may have a vital interest in the outcome of any bond election within the school district by reason of the improvements that passage of such election would allow, but the improvements within the school district that are to be made also carry the responsibility for the payment for these improvements, which responsibility under the law falls primarily on the real property taxpayer of the district.

In the present case it is our opinion that nonproperty owners as a class are substantially less affected by the outcome of a general obligation bond election than are property owners. Although nonproperty owners might feel the financial impact of a bond issue indirectly through increased rentals and prices in the economy and might have children attending the public schools, the effect of a bond issue upon the real property owner is to impose a lien upon his property for payment of the bonds. I.C. § 33-802. The court in *Cipriano* v. *City of Houma,* supra, explicitly recognized the greater interest which this lien gives to the real property owner when it noted that the bonds there were not to be paid from revenue derived from real property taxation.

Since it is our opinion that neither *Kramer* v. *Union Free School Dist.,* supra, nor *Cipriano* v. *City of Houma,* supra, prohibits discrimination between nonproperty owners and property owners in a general obligation bond election, we are reluctant to depart from the well settled Idaho law which has always upheld this distinction. See *Wiggin* v. *City of Lewiston,* 8 Idaho 527, 69 Pac. 286 (1902); *Hartman* v. *Meier,* 39 Idaho 261, 227 Pac. 25 (1924). Accordingly the alternative writ is quashed, writ of prohibition is denied and petition dismissed.

Costs to defendants.

DONALDSON, SHEPARD and SPEAR, *JJ.*, concur.

McQUADE, *J.*, dissenting.

I.C. § 34-2001A (S.L. 1969, Chapter 208, Section 2, approved March 21, 1969) reads in pertinent part as follows:

> "B. When the validity of any bond election is contested upon any of the grounds enumerated in section 34-2001 or upon any other grounds whatsoever the plaintiff or plaintiffs must, within forty (40) days after the votes are canvassed and the results thereof declared, file in the proper court a verified written complaint setting forth, in addition to the other requirements of this chapter, the following:
>
> (1) The name of the party contesting the bond election, and that he is an elector of the public entity conducting the bond election.
>
> (2) The proposition or propositions voted on at the election which are contested.
>
> (3) The particular grounds of such contest.
>
> "C. No such election contest shall be maintained and no bond election shall be set aside or held invalid unless a complaint is filed as permitted hereunder within the period prescribed in this section. As to bond elections which have been held prior to the effective date [March 21, 1969] of this act, no such contest shall be maintained wherein it is alleged that the bond election should be set aside or held on any ground enumerated in section 34-2001 or on any other ground, unless such bond election contest be filed as herein provided within forty (40) days from and after the effective date of this act."

This statute is clear and without exception. There is nothing in the section which even suggests that it does not now apply. Because the plaintiffs' petition was not filed within forty days after the election was held, the votes "canvassed, and the results thereof declared," we should dismiss this action. It was not timely brought because it was barred by I.C. § 34-2001A.

The majority, understandably anxious to reach the important constitutional issue raised in this case, has held that the defendants "waived" I.C. § 34-2001A. Such waiver is not lawful. The defendants can not waive the bar of I.C. § 34-2001A. As was said by the Supreme Court of Arizona in the case of *City of Glendale* v. *Coquat,* 52 P.2d 1178, 1180 (1935),

> "It is apparently universally held that where a right has been given to an individual not alone for his private benefit but, as a matter of public policy, in the interest of the state, it may not be waived by any one. Day v. McAllister, 15 Gray (Mass.) 433; Clark v. Spencer, 14 Kan. 398, 19 Am.Rep. 96; State v. Carman, 63 Iowa 130, 18 N.W. 691, 50 Am.Rep. 741; Recht v. Kelly, 82 Ill. 147, 25 Am.Rep. 301; Bosler v. Rheem, 72 Pa. 54; Branch v. Tomlinson, 77 N.C. 388; Clark v. State, 142 N.Y. 101, 36 N.E. 817; Larsen v. Rice, 100 Wash. 642, 171 P. 1037; Cata v. Grendel Cotton Mills, 132 S.C. 454, 129 S.E. 203, 41 A.L.R. 439. As was said by the New York Court of Appeals, in Wright v. State, 223 N.Y. 44, 119 N.E. 83, 85, 'Such conclusion would permit an officer of the state to defeat the beneficent purpose of the statute and violate its provisions.'"

Buyers of Idaho bonds forty days after an election must be secure in the knowledge that their investment will not be jeopardized by a legal action contesting that election. By allowing these defendants to waive I.C. § 34-2001A, this Court has thrown open to challenge every bond election in the past or in the future of this state.

A valid "waiver" necessarily involves a choice to give up a right personal to the party doing the waiving. In order for a "waiver" to be permissible in this case a representative of the purchasers of the bonds, issued as a result of the election which is challenged in this action, would have to be a party. There is no such representative before us. The record provides no indication that the

defendants have been authorized to make a waiver under I.C. § 34-2001A for those bondholders. The defendants' attempt to waive the provisions of the statute should be given no effect. This action was not timely brought.

I respectfully dissent from the opinion of the majority.

CERTIFICATE

I, the undersigned counsel for Amicus Curiae, Salt Lake City, Utah, do hereby certify that a copy of the foregoing brief has been served on all counsel in this matter by depositing a copy thereof in the United States Mail, postage prepaid, addressed to each of them at his respective address of record.

this 6th day of February, 1970

Phillip N. Hahn